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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT DAY AND THE DEPARTMENT OF REVENUE, et al.,	)	
Appellants,	)	CASE NO. 69,578
vs.	)	
HIGH POINT CONDOMINIUM RESORTS, LTD., et al.,	)	
Appellees.	)	

REPLY BRIEF OF AMICUS CURIAE

Jimmy Alvarez as the Property Appraiser of Bradford County, and the Property Appraisers' Association of Florida

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STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

There have been adequately set forth in prior briefs and need not be restated.

ARGUMENT

The sum and substance of the Appellees' argument and all of their contentions is set forth beginning at page 9 of their brief:

> Both of the Appellant Day and the Department of Revenue suggest that there if no "God given right" to a tax bill. The Department even quotes Section 197.0151(1), Fla.Stat. 1983 expressing the duty of "owners of property" to ascertain and pay the amount of current and delinquent taxes. Appellees didn't attack 197.0151(1). However, they did complaint and they do now complain that they cannot, as property owners, discharge their duty of law to ascertain and pay the taxes on their property as charged under 197.0151(1). Why not? Because Section 192.037(2), prohibits the property appraiser from entering and extending the property owned by each of the Appellee Taxpayers on the tax rolls and Section 192.037(7) prohibits the tax collector from accepting payment of the taxes on a fee time share period (anything less than the entire project). (e.s.)

If the Court struck the entire statute the time-share period owners would be in the same position as they are now; that is each period owner would be a joint owner (tenant in common) with other tenants in common of a single parcel of real property. Appellees are actually then complaining because the Legislature has not enacted a statute making each time-share period a separate parcel of

real property. Since this Court could not enact law or create a statute, a holding that Section 192.037, F.S., is unconstitutional, would not alter, change, or affect the taxpayers' posture; they would still be joint owners of a single parcel of real property. In this light then the validity or invalidity of the statute is immaterial because the taxpayers relief is with the Legislature. And the taxpayers have not attacked the entire body of tax laws of the State, only Section 192.037, F.S. So the issue of whether a system whereby all real property is subjected to ad valorem taxation, where all interests in a single parcel of real property are taxed as a single parcel, unless the Legislature determines otherwise, is not before this Court.

This is made crystal clear by the Appellees' brief because the taxpayers do not attempt to refute several arguments made by the Appraisers Association so those may be accepted as correct. Among the arguments which are not refuted are:

1. That all interests in real property must be included in the tax assessment of the property unless the Legislature authorizes separate taxation of the various interests, as it has been done for sub-surface interests under Section 193.481, F.S., and condominiums under Section 718.106(1), F.S. Thus, unless the Legislature authorizes by statute separate taxation as a separate parcel of real

property, all such various interests which may have been conveyed in a single parcel of real property, must still be subject to taxation as a single parcel, regardless of the number of owners of the various interests which may have been conveyed.

2. Under Florida law ad valorem property taxes are imposed upon and against the property not the owner of same. If the taxes so imposed are not paid, a lien exists against the property which can result in the sale of a tax certificate and ultimately a tax deed, but no personal debt is created against the owner.

3. Under Florida law all persons are charged by law with the knowledge that real property owned by them is subject to taxation, and charged by law with the duty of ascertaining the amount of the taxes owed and paying same. Section 197.0151, F.S., 1985, and Section 197.332, F.S., 1986. This is statutory notice and all the notice that is required for due process purposes.

4. Multiple or joint owners of time-share property are treated no differently than multiple or joint owners of other parcels of property, because it is the individual parcel of property which is taxed and not each owner's interest in a single parcel.

Furthermore, the taxpayers do not present any argument suggesting that Section 192.037, F.S., is a statute

designed to accomplish the result of providing that each individual time=share period or estate is a separate parcel of real property for taxation purposes. The reason for this omission is that the taxpayers cannot advance this argument in light of the clear language of the statute demonstrating that the Legislature did not intend that each time-share period or estate be a separate parcel of property. This is clearly demonstrated by the first sentence of Section 192.037(2), F.S., and all of Section 192.037(7), F.S., each of which provides:

> (2) Fee time-share real property shall be listed on the assessment rolls as a single entry for each time-share development.
>
> (7) The tax collector shall accept only full payment of the taxes and special assessments due on the time-share development.

"Time-share estate" and "time-share period" are defined in Section 721.05(24), F.S., and Section 721.05(27), F.S., as follows:

> (24) "Time-share estate" means a right to occupy a time-share unit, coupled with a freehold estate or an estate for years with a future interest in a time-share property for a specified portion thereof.
>
> (27) "Time-share period" means that period of time when a purchaser of time-share plan is entitled to the possession and use of the accommodations or facilities, or both, of a time-share plan.

"Time-share property" is defined in Section 721.05(29), F.S., as follows:

> (29) "Time-share property" means one or more time-share units subject to the same time-share instrument, together with any other property or rights to property appurtenant to those units.

In promulgating its rules dealing with time-share property the Department of Revenue used the same definitions as in Section 721.05, F.S. and defined the term "time-share development" which is used in Section 192.037, F.S., as follows:

> "Time-share Development" means an accommodation of a time-share plan which is divided into time-share periods. (Synonymous with "time-share unit"). (12D-6.06 F.A.C.)

"Time-share unit" is defined in Section 721.05(30), F.S., as follows:

> (30) "Time-share unit" means an accommodation of a time-share plan which is divided into time-share periods.

"Fee time-share real property" is defined in Section 192.001(14), F.S., as follows:

> (14) "Fee time-share real property" means the land and buildings and other improvements to land that are subject to <u>time-share interests</u> which are sold as a <u>fee interest in real property</u>. (e.s.).

These various statutory provisions and definitions

make it clear that the Legislature considers the entire time-share development as the parcel being assessed.

An analysis of the statutes makes it crystal clear that the Legislature intended the "time-share development" as the parcel of property and not the time-share period or unit. That is why the Legislature required a single listing on the assessment rolls for each time-share development and dictated that the Tax Collector shall accept only full payment for each time-share development. This is consistent with the law which prohibits the Tax Collector from accepting a partial payment of taxes due on a single parcel except where a good faith payment is permitted under Section 194.171(3) and (5), F.S. This operates as a limited exception to the Tax Collector's duty to collect all taxes assessed on the assessment rolls set forth in Section 197.012, F.S., and taxes are assessed per parcel.

The following statement at page 4 of the taxpayers brief demonstrates a misunderstanding of Florida ad valorem tax law and the purpose of Section 193.037, F.S.

> The right to ascertain the valuation of ones own property and pay the taxes thereon, thereby discharging the lien for such taxes, is fundamental to the ownership and protection of property. (e.s.).

In Florida, the law has always been that each taxpayer is charged with knowledge that his property is

subject to taxation and has the duty to ascertain the amount of taxes owned and paying same. All time-share units owners are charged with the same knowledge and duty just like every other property owner. Obviously the taxpayer is contending that each time-share period should be considered the parcel of property being assessed instead of the time-share development. In effect then he is disagreeing with the legislative decision not to subdivide and separate for tax purposes and declare each individual time-share period or estate as a separate parcel of real property. As this Court has recognized in numerous cases, under Florida law, all interests in a parcel of property are required to be assessed as a single parcel unless the Legislature provides otherwise. See Dickinson v.Davis, 224 So.2d 262 (Fla. 1969); Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1970); Valls v. Arnold Industries, Inc., 328 So.2d 471 (Fla. 2 DCA 1976); and Wolfson v. Heins, 149 Fla. 499 6 So.2d 858 (Fla. 1942). Implied in this Court's holding in these cases and particularly Dickinson, is the holding that it is the Legislature's prerogative to declare interests in a single parcel to be separate parcels for ad valorem tax purposes.

Land may be divided vertically by conveyance or transfer and horizontally as was pointed out in Dickinson, but unless the Legislature provides for separate taxation of

the parcel divided horizontally (mineral rights) the subsurface would have to continue to be treated and taxed as part of the surface parcel and not as a separate parcel.

In time-share property, such is divided in terms of usage for or during a particular period of time. But the fee interest in the property remains by virtue of the instruments of conveyances in the various joint owners as tenants in common with a right of occupancy or use which is restricted to the given weekly period or a week within a particular month or months. Examples of instruments of conveyance taken from the public records attached as exhibits demonstrates some of the various ways time-share periods are transferred.

Exhibit A, which is a Warranty Deed from Flagler County conveys:

> ". . . the following described 'Time Share Interest' (as hereinafter defined) in THE HARBOR CLUB 1, A TIME SHARE RESORT ('Resort Facility'), which Resort Facility is legally described as in Exhibit "A" attached to the Time Sharing Plan referenced below and recorded in Flagler County, Florida which Time Share interest is more particularly described as follows:
> An undivided 1/624 interest as a tenant in common with other owners in the Resort Facility (1 Time Share Interest(s)), according to the Time Sharing Plan thereof, recorded in Official Records Book 250, Pages 693 through 623, of the Public Records of Flagler County, Florida ("Plan").

> Together with the right to reserve, pursuant to the Reservation System set forth in the Plan, a Unit and Unit Week(s) during Assigned Use Period. Grantee shall not be deemed a successor or assign of Grantor's rights or obligations under the aforedescribed Plan or any instrument referred to therein. Grantee, by acceptance hereof, and by agreement with Grantor, hereby expressly assumes and agrees to be bound by and to comply with all of the covenants, terms, conditions and provisions set forth and contained in the Plan, including, but not limited to, the obligation to make payment for assessments for the maintenance and operation of the Resort Facility which may be levied against the abovedescribed Time Share Interest". (e.s.).

Exhibit B is an "Interval Ownership Unit Week Deed" recorded in Pasco County and it provides in part:

> "NOW THEREFORE, in consideration of the sum of Ten dollars ($10.00) and other valuable consideration, the Grantor has and does hereby grant, sell, transfer, convey, assign, set over and deliver to Grantee, his personal representative, heirs, and assigns, the following described property lying and being in Pasco County, Florida, from twelve o'clock noon of the first day to twelve o'clock noon of the last day assigned to said Grantee during the below described Unit Week Number as said Unit Week is numbered and defined in the Declaration of Condominium and recorded in the Public Records of Pasco County, Florida, in the book and at the page number hereinafter described below, which estate is to be succeeded forthwith by a succession of other estates in consecutive and chronological order, revolving among the other unit Weeks, described in the aforesaid Declaration of Condominium, in order annually, it

being the intent of this instrument that each Unit Week shall be considered a separate estate held separately and independently by the respective owners thereof for and during the period of time assigned to each in said Declaration of Condominium, each said estate being succeeded by the next in unending succession governed by said Declaration of Condominium until twelve o'clock noon on the first Saturday 2032, at which date said estate shall terminate.
TOGETHER with the remainder over in fee simple absolute, as tenants in common with the other units of all the Unit Weeks in the hereafter described condominium parcel in that percentage interest determined and established by the aforesaid Declaration of Condominium for the following described real estate located in the county of Pasco in the State of Florida, as follows:. . .". (e.s.).

Exhibit C is a Warranty Deed recorded in Osceola County which provides in part:

"That the grantor, for and in consideration of the sum of $10.00 and other good and valuable considerations, receipt whereof is hereby acknowledged, by these presents does grant, bargain, sell, alien, remise, release, convey and confirm unto the grantee, a time-share estate in that certain property described below from 12:00 noon of the first day until 12:00 noon of the last day assigned to the aforesaid grantee during the specific Unit Week number designated hereinbelow, as said Unit Week is numbered, designated and defined in the Declaration of Condominium of HIGH POINT WORLD RESORT, III, formerly known as HIGH POINT WORLD RESORT, II, as recorded in the Official Records Book 752 at the pages 2568-2718 described below in the Public Records of Osceola

> County, Florida, which estate represents a separate and independent right, hereby vested in grantee of exclusive use, possession and occupancy of the Condominium Unit described hereinbelow, during the following designated Unit Week, which right circulates among the other owners of time-share estates in the same Condominium Unit, in accordance with a fixed successive and recurring annual schedule, all as described and particularly defined in the aforesaid Declaration of Condominium, until 12:00 noon on the first Saturday in the year 2001, at which date said estate shall terminate together with a remainder over in fee simple absolute, as tenant in common with the other Unit Week owners, in the following described Condominium Unit, the extent of which tenancy shall be commensurate with the percentage interest determined and established by Exhibit "E" to the aforesaid Declaration of Condominium for the following described real property located in Osceola County, Florida, to wit"
> UNIT WEEK NO. 46, 47, in Condominium Unit No. 711, 712 of HIGH POINT WORLD RESORT, PHASE III, according to the Declaration of Condominium thereof as recorded in Official Records Book 752 at Page 2568 through 2718 inclusive and all amendments thereto, if any, of the Public Records of Osceola County, Florida. . ."

As can be noted under Exhibits B and C, the grantee becomes a tenant in common with the other unit week owners in Fee Simple Absolute. These are clearly conveyances which create multiple or joint ownership of a parcel of real property which is the condominium unit. This condominium unit would be the "time-share development" referred to in Section 192.037(2), F.S., which is required

to be listed on the tax roll, and would be the parcel of property against which taxes would be extended by the Property Appraiser and collected by the Tax Collector, and this would be true even if Section 192.037 did not exist.

In Exhibit C, that which is transferred is an undivided 1/624 interest as a tenant in common in resort facility "1".

Thus, that which is conveyed in all situations is an undivided interest in a parcel of real property which is subject to ad valorem tax like any other parcel.

Counsel for the taxpayer has chosen not to address the due process and equal protection arguments separately and has suggested that the two are "totally intertwined". (Appellees Brief p.6). They are not intertwined as suggested, and it is more probably that the taxpayers' decision not to address them separately, stems from a total inability to support the District Court's decision when each is subjected to separate scrutiny.

With regard to due process the statute charges all taxpayers with knowledge (notice) that their property is subject to tax, and places the duty on them to ascertain the amount of taxes owed and paying same. All property owners, including time-share period owners, are permitted to challenge an assessment before the Property Appraisal Adjustment Boards. See Section 192.037(4), F.S. Hence the

due process requirements of notice and opportunity to be heard are met.

With regard to denial of equal protection, all property owners are treated identically. They are all charged with the same knowledge and duty. Whether the property is held individually, as husband and wife, or through joint ownership such as tenants in common, it is the parcel of property which is listed on the tax roll and the parcel which stands forfeit if taxes are not paid. One bill is generated per parcel regardless of the number of owners, but the law charges all owners with knowledge that their property is subject to tax. This is fundamental to Florida real property ad valorem tax law and probably in all states.

A statement at page 14 of the Appellees Brief is incorrect and deserves mention. It states:

> "If the time shares are leaseholds, the value of the whole is determined without regard to lease income, Section 193.023(4), F.S. If they are fee time shares, the "value" of each unit is determined and those separate values"combined" to determine the "value" of the whole.

The taxpayers are misreading Section 193.023(4), F.S. It provides:

> (4) In making his assessment of leasehold interests in property serving the unit owners of a condominium or cooperative subject to a lease, including property subject to a recreational lease, the property

> appraiser shall assess the property at its fair market value without regard to the income derived from the lease. (e.s.).

The statute addresses the assessment of leasehold interests in property serving unit owners of a condominium, or cooperative subject to a lease. These type leases are used frequently to provide use in recreational features such as tennis courts, swimming pools, golf courses, and docking facilities, as well as common elements such as entrance ways and hallways. The purpose of this statute was to recognize that the value of such support leases in such features, is already reflected in the value placed on the condominium or cooperative, and thus avoids double taxation of the same property value.

The suggestion that the values would be dramatically different in the assessment of time-share periods held by lease instead of deed is totally false. The condominium used as rental property would be assessed following the eight factors set forth in Section 193.011, F.S., just the same as that held by conveyance to multiple owners as tenants in common. Allowances would be made for cost of sale (first and eighth criteria adjustment), and the just value of the parcel would be determined considering cost, income, and market approaches to value. In assessing property used as commercial rental property the income

approach would certainly be applicable, using the accepted formula as set forth below:

$$\frac{\text{Net Income}}{\text{Overall rate of return (Capitalization rate)}} = \text{Value}$$

The formula is sometimes expressed as:

$$V + \frac{NOI}{CAP.\ Rate}$$

The purpose is to reach just value and that is a constitutional requirement. With or without Section 192.037, F.S., that would be the goal in determining the parcel's value whether used as residential property or commercially as rental or lease property.

CONCLUSION

The statute, Section 192.037, F.S., is valid. All property is treated the same and Section 192.037, F.S., doesn't alter that. What the taxpayers really seek is to have the Legislature enact a law making each time-share period or estate a separate parcel of real property for ad valorem tax purposes. But that decision is a legislative prerogative, since the courts cannot enact law. No due process or equal protection violations exist because time-share period owners are treated as all other joint owners of a single parcel of real property.

It is respectfully submitted that the decision of the Third District Court of Appeal should be reversed.

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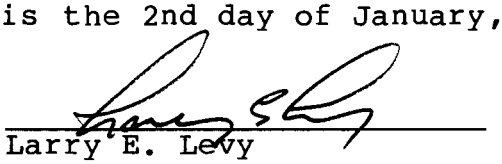
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on R. STEPHEN MILES, ESQUIRE, 2727 13th Street, St. Cloud, Florida, 32769; MURRAY W. OVERSTREET, JR., ESQUIRE, Post Office Box 760, Kissimmee, Florida 32743; J. TERRELL WILLIAMS, ESQUIRE, Asst. Attorney General, The Capitol, Rm LL04, Tallahassee, Florida 32301; BENJAMIN T. SHUMAN, ESQUIRE, 611 N. Pine Hills Road, Orlando, Florida 32808; and DAVID L. COOK, ESQUIRE, and CLAIRE A. DUCHEMIN, ESQUIRE, Yound, Van Assenderp, Varnadoe & Benson, Post Office Box 1883, Tallahassee, Florida 32302 on this the 2nd day of January, 1987.



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